



INTERNATIONAL TRADE COMMISSION

Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: U.S. International Trade Commission.

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: Since February 1991, the U.S. International Trade Commission (“Commission”) has published in the Federal Register reports on the status of its practice with respect to breaches of its administrative protective orders (“APOs”) under title VII of the Tariff Act of 1930 in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than under title VII and violations of the Commission’s rules, including the rule on bracketing business proprietary information (the “24-hour rule”). This notice provides a summary of APO breach investigations completed during fiscal years 2020 and 2021. This summary addresses APO breach investigations related to proceedings under both title VII and section 337 of the Tariff Act of 1930. The Commission intends for this summary to inform representatives of parties to Commission proceedings of the specific types of APO breaches before the Commission and the corresponding types of actions that the Commission has taken.

FOR FURTHER INFORMATION CONTACT: Ryan Glanzer, Office of the General Counsel, U.S. International Trade Commission, telephone (202) 708-2508. Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its website at <https://www.usitc.gov>.

SUPPLEMENTARY INFORMATION: Statutory authorities for Commission investigations provide for the release of business proprietary information (“BPI”) or confidential business information (“CBI”) to certain authorized representatives in accordance with requirements set forth in Commission regulations. Such statutory and regulatory authorities include: 19 U.S.C. 1677f; 19 CFR 207.7; 19 U.S.C. 1337(n); 19 CFR 210.5, 210.34; 19 U.S.C. 2252(i); 19 CFR 206.17; 19 U.S.C. 4572(f); 19 CFR 208.22; 19 U.S.C. 1516a(g)(7)(A); and 19 CFR 207.100 - 207.120. The discussion below describes APO breach investigations that the Commission completed during fiscal years 2020 and 2021, including descriptions of actions taken in response to any breaches.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and rule violations. *See* 85 FR 7589 (Feb. 10, 2020); 83 FR 42140 (Aug. 20, 2018); 83 FR 17843 (Apr. 24, 2018); 82 FR 29322 (June 28, 2017); 81 FR 17200 (Mar. 28, 2016); 80 FR 1664 (Jan. 13, 2015); 78 FR 79481 (Dec. 30, 2013); 77 FR 76518 (Dec. 28, 2012); 76 FR 78945 (Dec. 20, 2011); 75 FR 66127 (Oct. 27, 2010); 74 FR 54071 (Oct. 21, 2009); 73 FR 51843 (Sept. 5, 2008); 72 FR 50119 (Aug. 30, 2007); 71 FR 39355 (July 12, 2006); 70 FR 42382 (July 22, 2005); 69 FR 29972 (May 26, 2004); 68 FR 28256 (May 23, 2003); 67 FR 39425 (June 7, 2002); 66 FR 27685 (May 18, 2001); 65 FR 30434 (May 11, 2000); 64 FR 23355 (Apr. 30, 1999); 63 FR 25064 (May 6, 1998); 62 FR 13164 (Mar. 19, 1997); 61 FR 21203 (May 9, 1996); 60 FR 24880 (May 10, 1995); 59 FR 16834 (Apr. 8, 1994); 58 FR 21991 (Apr. 26, 1993); 57 FR 12335 (Apr. 9, 1992); and 56 FR 4846 (Feb. 6, 1991). This report does not provide an exhaustive list of conduct that will be deemed to be a breach of the Commission’s APOs. The Commission considers APO breach investigations on a case-by-case basis.

As part of the Commission’s effort to educate practitioners about the Commission’s current APO practice, the Secretary to the Commission (“Secretary”) issued in April 2020 a fifth edition of *An Introduction to Administrative Protective Order*

Practice in Import Injury Investigations (Pub. No. 5052). This document is available on the Commission's website at <http://www.usitc.gov>.

I. In General

A. Antidumping and Countervailing Duty Investigations

The current APO application form for antidumping and countervailing duty investigations, which the Commission revised in May 2020, requires an APO applicant to agree to:

(1) Not divulge any of the BPI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than--

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision making for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for U.S. judicial or review pursuant to the North American Free Trade Agreement the determination resulting from such

investigation of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO or otherwise obtained in this investigation without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (e.g., documents, computer disks or similar media) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media or similar media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) With a cover sheet identifying the document as containing BPI,

(ii) With all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) If the document is to be filed by a deadline, with each page marked "Bracketing of BPI not final for one business day after date of filing," and

(iv) Within two envelopes, the inner one sealed and marked "Business Proprietary Information--To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI;

(7) Comply with the provision of this APO and section 207.7 of the

Commission's rules

(i) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g. change in personnel assigned to the investigation),

(ii) Report promptly and confirm in writing to the Secretary any possible breach of this APO, and

(iii) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

The APO form for antidumping and countervailing duty investigations also provides for the return or destruction of the BPI obtained under the APO on the order of the Secretary, at the conclusion of the investigation, or at the completion of Judicial Review. The BPI disclosed to an authorized applicant under an APO during the preliminary phase of the investigation generally may remain in the applicant's possession during the final phase of the investigation.

The APO further provides that breach of an APO may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of, or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

APOs issued in cross-border long-haul trucking (“LHT”) investigations, conducted under the United States-Mexico-Canada Agreement Implementation Act, 19 U.S.C. 4571-4574 (19 U.S.C. 4501 note), and safeguard investigations, conducted under the statutory authorities listed in 19 CFR 206.1 and 206.31, contain similar (though not identical) provisions.

B. Section 337 Investigations

APOs in section 337 investigations differ from those in title VII investigations: There is no set form like the title VII APO application, and provisions of individual APOs may differ depending on the investigation and the presiding administrative law judge. However, in practice, the provisions are often similar in scope and applied quite similarly. Any person seeking access to CBI during a section 337 investigation (including outside counsel for parties to the investigation, secretarial and support personnel assisting such counsel, and technical experts and their staff who are employed for the purposes of the investigation) is required to read the APO, file a letter with the Secretary indicating agreement to be bound by the terms of the APO, agree not to reveal CBI to anyone other than another person permitted access by the APO, and agree to utilize the CBI solely for the purposes of that investigation.

In general, an APO in a section 337 investigation will define what kind of

information is CBI and direct how CBI is to be designated and protected. The APO will state which persons may have access to CBI and which of those persons must sign onto the APO. The APO will provide instructions on how CBI is to be maintained and protected by labeling documents and filing transcripts under seal. It will provide protections for the suppliers of CBI by notifying them of a Freedom of Information Act request for the CBI and providing a procedure for the supplier to seek to prevent the release of the information. There are provisions for disputing the designation of CBI and a procedure for resolving such disputes. Under the APO, suppliers of CBI are given the opportunity to object to the release of the CBI to a proposed expert. The APO requires a person who discloses CBI, other than in a manner authorized by the APO, to provide all pertinent facts to the supplier of the CBI and to the administrative law judge and to make every effort to prevent further disclosure. Under Commission practice, if the underlying investigation is before the Commission at the time of the alleged breach or if the underlying investigation has been terminated, a person who discloses CBI, other than in a manner authorized by the APO, should report the disclosure to the Secretary. *See* 19 CFR 210.25, 210.34(c). The APO requires all signatories to the APO to either return to the suppliers or destroy the originals and all copies of the CBI obtained during the investigation.

The Commission's regulations provide for certain sanctions to be imposed if the APO is violated by a person subject to its restrictions. The names of the persons being investigated for violating an APO are kept confidential unless the sanction imposed is a public letter of reprimand. 19 CFR 210.34(c)(1). The possible sanctions are:

- (1) An official reprimand by the Commission.
- (2) Disqualification from or limitation of further participation in a pending investigation.
- (3) Temporary or permanent disqualification from practicing in any capacity

before the Commission pursuant to 19 CFR 201.15(a).

- (4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice.
- (5) Making adverse inferences and rulings against a party involved in the violation of the APO or such other action that may be appropriate. 19 CFR 210.34(c)(3).

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI or CBI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of BPI and CBI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI and CBI and face potentially severe penalties for noncompliance. *See* 18 U.S.C. 1905; title 5, U.S. Code; and Commission personnel policies implementing the statutes. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken.

II. Investigations of Alleged APO Breaches

The Commission conducts APO breach investigations for potential breaches that occur in title VII, safeguard, and LHT investigations, as well as potential breaches in section 337 investigations that are before the Commission or have been terminated.¹ Administrative law judges handle potential APO breaches in section 337 investigations when the breach occurred and is discovered while the underlying investigation is before the administrative law judge. The Commission may review any decision that the administrative law judge makes on sanctions in accordance with Commission regulations.

¹ Procedures for investigations to determine whether a prohibited act, such as a breach, has occurred and for imposing sanctions for violation of the provisions of a protective order issued during a NAFTA panel or committee proceedings are set out in 19 CFR 207.100-207.120. The Commission's Office of Unfair Import Investigations conducts those investigations initially.

See 19 CFR 210.25, 210.34(c).

For Commission APO breach investigations, upon finding evidence of an APO breach or receiving information that there is reason to believe that one has occurred, the Secretary notifies relevant Commission offices that the Secretary has opened an APO breach file and that the Commission has commenced an APO breach investigation. The procedure for investigating alleged breaches of APOs has historically had two steps. First, the Commission determines whether a breach has occurred and, if so, who is responsible for it. This is done after the alleged breaching parties have been provided an opportunity to present their views on the matter. The breach investigation may conclude after this first step if: (1) the Commission determines that no breach occurred and issues a letter so stating; or (2) the Commission finds that a breach occurred but that no further action is warranted and issues a warning letter. Second, if the Commission determines that a breach occurred and that further action is warranted, the Commission will then determine what sanction, if any, to impose. The breaching parties are provided an opportunity to present their views on the appropriate sanction and any mitigating circumstances. The Commission can decide as part of either the first or second step to issue a warning letter. A warning letter is not a sanction, but the Commission will consider a warning letter as part of a subsequent APO breach investigation.

The Commission has found that the two-step process can result in duplicative work for the alleged breaching party and Commission staff in some APO breach investigations. For example, parties who self-report their own breach often address mitigating circumstances and sanctions in their initial response to the Commission's letter of inquiry on the breach. But under the Commission's two-step process, they must await a Commission decision on breach and then submit again their views on mitigating circumstances and sanctions. To streamline this process and accelerate processing times,

the Commission has begun to offer alleged breaching parties in pending and new APO breach investigations the option to voluntarily elect a one-step APO breach investigation process. Under this process, the Commission will determine simultaneously whether a breach occurred and, if so, the appropriate sanction to impose, if any.

Sanctions for APO violations serve three basic interests: (a) preserving the confidence of submitters of BPI/CBI that the Commission is a reliable protector of BPI/CBI; (b) disciplining breachers; and (c) deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed: “[T]he effective enforcement of limited disclosure under [APO] depends in part on the extent to which private parties have confidence that there are effective sanctions against violation.” H.R. Conf. Rep. 100-576, at 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not authorized under the APO actually viewed the BPI/CBI. The Commission considers whether there have been prior breaches by the same person or persons in other investigations and multiple breaches by the same person or persons in the same investigation.

The Commission’s rules permit an economist or consultant to obtain access to BPI/CBI under the APO in a title VII, safeguard, or LHT investigation if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an

interested party who is a party to the investigation. *See* 19 CFR 207.7(a)(3)(i)(B) and (C); 19 CFR 206.17(a)(3)(i)(B) and (C); and 19 CFR 208.22(a)(3)(i)(B) and (C). Economists and consultants who obtain access to BPI/CBI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the Commission may also hold the attorney exercising direction or control over the economist or consultant responsible for the breach of the APO. In section 337 investigations, technical experts and their staff who are employed for the purposes of the investigation are required to sign onto the APO and agree to comply with its provisions.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases, section 337 investigations, safeguard investigations, and LHT investigations are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. *See, e.g.*, 19 U.S.C. 1677f(g); 19 U.S.C. 1333(h); 19 CFR 210.34(c).

The two types of breaches most frequently investigated by the Commission involve: (1) the APO's prohibition on the dissemination of BPI or CBI to unauthorized persons; and (2) the APO's requirement that the materials received under the APO be returned or destroyed and that a certificate be filed with the Commission indicating what actions were taken after the termination of the investigation or any subsequent appeals of the Commission's determination. The dissemination of BPI/CBI usually occurs as the result of failure to delete BPI/CBI from public versions of documents filed with the Commission or transmission of proprietary versions of documents to unauthorized recipients. Other breaches have included the failure to bracket properly BPI/CBI in

proprietary documents filed with the Commission, the failure to report immediately known or suspected violations of an APO, and the failure to adequately supervise non-lawyers in the handling of BPI/CBI.

Occasionally, the Commission conducts APO breach investigations that involve members of a law firm or consultants working with a firm who were granted access to APO materials by the firm although they were not APO signatories. In many of these cases, the firm and the person using the BPI/CBI mistakenly believed an APO application had been filed for that person. The Commission has determined in all of these cases that the person who was a non-signatory, and therefore did not agree to be bound by the APO, could not be found to have breached the APO. However, under Commission rule 201.15 (19 CFR 201.15), the Commission may take action against these persons for good cause shown. In all cases in which the Commission has taken such action, it decided that the non-signatory was a person who appeared regularly before the Commission, who was aware of the requirements and limitations related to APO access, and who should have verified his or her APO status before obtaining access to and using the BPI/CBI. The Commission notes that section 201.15 may also be available to issue sanctions to attorneys or agents in different factual circumstances in which they did not technically breach the APO, but their action or inaction did not demonstrate diligent care of the APO materials, even though they appeared regularly before the Commission and were aware of the importance that the Commission places on the proper care of APO materials.

Counsel participating in Commission investigations have reported to the Commission potential breaches involving the electronic transmission of public versions of documents. In these cases, the document transmitted appears to be a public document with BPI/CBI omitted from brackets. However, the confidential information is actually retrievable by manipulating codes in software. The Commission has found that the

electronic transmission of a public document containing BPI/CBI in a recoverable form was a breach of the APO.

The Commission has cautioned counsel to be certain that each authorized applicant files with the Commission within 60 days of the completion of an import injury investigation or at the conclusion of judicial or binational review of the Commission's determination, a certificate stating that, to his or her knowledge and belief, all copies of BPI/CBI have been returned or destroyed, and no copies of such materials have been made available to any person to whom disclosure was not specifically authorized. This requirement applies to each attorney, consultant, or expert in a firm who has access to BPI/CBI. One firm-wide certificate is insufficient.

Attorneys who are signatories to the APO representing clients in a section 337 investigation should inform the administrative law judge and the Secretary if there are any changes to the information that was provided in the application for access to the CBI. This is similar to the requirement to update an applicant's information in title VII investigations.

In addition, attorneys who are signatories to the APO representing clients in a section 337 investigation should send a notice to the Commission if they stop participating in the investigation or the subsequent appeal of the Commission's determination. The notice should inform the Commission about the disposition of CBI obtained under the APO that was in their possession, or the Commission could hold them responsible for any failure of their former firm to return or destroy the CBI in an appropriate manner.

III. Specific APO Breach Investigations

A. Fiscal Year 2020

Case 1. The Commission determined that a supervisory attorney at a law firm breached an APO in a title VII investigation when he directed legal support staff at his

firm to distribute two APO releases containing BPI to consultants before the filing, and the Commission's acceptance, of the consultants' APO amendment application. The Commission issued a warning letter to the supervisory attorney but found that the supervisory attorney's legal support staff and the consultants had not breached the APO.

Before the first APO release at issue, the supervisory attorney, an APO signatory, directed his legal assistant to file an APO amendment application for the consultants. Due to technical issues, the legal assistant did not file the APO amendment application and did not inform anyone that she never completed the filing. The legal assistant stated that she was not aware of the time sensitivity of the APO amendment application. Without confirming whether the retained consultants had been added to the APO, the supervisory attorney instructed legal support staff to provide APO release materials from two releases to the retained consultants. Legal support staff at the firm did not confirm whether the consultants had been added to the APO before transferring the APO release materials. The day after the second release, the firm's staff discovered that the consultants' APO amendment application had not been filed with the Commission, and staff filed the APO amendment application on the same day as this discovery. The Commission ultimately granted the application and placed the consultants on the APO.

The Commission first became aware of this breach through opposing counsel. The supervisory attorney did not notify the Secretary of the potential breach until twelve days after his firm's discovery.

In determining whether to issue a sanction for the breach, the Commission considered mitigating factors, including that: (1) the breach was unintentional; (2) the supervisory attorney had not previously been found in breach of an APO; (3) he and his firm took immediate corrective action upon discovery of the breach; (4) his firm implemented new procedures to prevent similar breaches in the future; and (5) the retained consultants were eventually added to the APO, handled the BPI at all times as if

they were subject to the APO, and did not disclose the BPI to unauthorized individuals. The Commission also considered the following aggravating factors: (1) the retained consultants were not authorized under the APO when they first received and viewed BPI; (2) opposing counsel, not the supervisory attorney or his firm, first notified the Commission of the breach; and (3) the supervisory attorney and his firm waited twelve days after discovering the breach to report it to the Commission. Ultimately, the Commission determined that the mitigating factors outweighed the aggravating factors, and it issued a warning letter rather than a sanction. The consultants were the only non-signatories to view the BPI, and they were eventually added to the APO.

The Commission also considered whether to find the supervisory attorney's legal support staff and the consultants in breach of the APO, and it determined not to do so. The Commission found that the supervisory attorney's lack of oversight resulted in his staff's failure to comply with APO procedures. He had not relayed the urgency of the APO amendment application filing, and he did not instruct his staff to ensure that the consultants were on the APO before transferring APO release materials to them. The Commission similarly determined not to find the consultants in breach because they did not know that they were not authorized under the APO to view the BPI when they received it. Further, the consultants handled the BPI at all times as if they were under the APO, and they did not share the APO materials with unauthorized individuals.

B. Fiscal Year 2021

Case 1. The Commission determined that an attorney breached the APO in a section 337 investigation when he disclosed CBI in open court before the U.S. Court of Appeals for the Federal Circuit ("CAFC"). The Commission issued a private letter of reprimand.

The attorney's disclosure of CBI occurred during his rebuttal to opposing counsel's opening oral argument. Opposing counsel objected to the disclosure and moved

that the CAFC not post a transcript or recording. In response to opposing counsel's objection, the attorney ended his rebuttal. A Commission attorney was present at the time of the disclosure and notified the Secretary of the breach. Following additional briefing from the parties on the disclosure, the CAFC ultimately granted opposing counsel's motion to withhold the transcript and recording of the oral argument from its website, and no transcript or recording was ever posted. However, individuals not authorized to receive CBI under the APO were present at the CAFC oral argument at the time of the disclosure.

In determining the appropriate sanction in response to the breach, the Commission considered mitigating factors, including: (1) the breach was inadvertent and unintentional; (2) the Commission was immediately aware of the breach due to its staff's presence at the oral argument; and (3) the attorney took prompt corrective action to mitigate the effect of the breach. The Commission also considered the following aggravating factors: (1) opposing counsel discovered the breach; and (2) the Commission presumed that non-signatories to the APO who were present at the CAFC oral argument heard the CBI, and the attorney did not present any evidence to the contrary. The Commission determined to issue a private letter of reprimand.

By order of the Commission.

Issued: December 14, 2021.

Lisa Barton,

Secretary to the Commission.